

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

Affidavit

77-4127

To be argued by
RICHARD J. LEON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-4127

ACHWAN HORNG,

Petitioner,

—against—

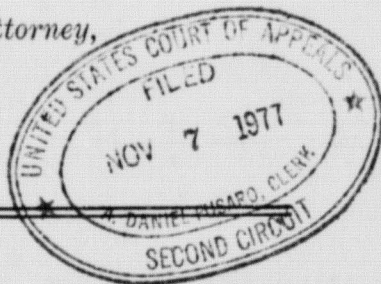
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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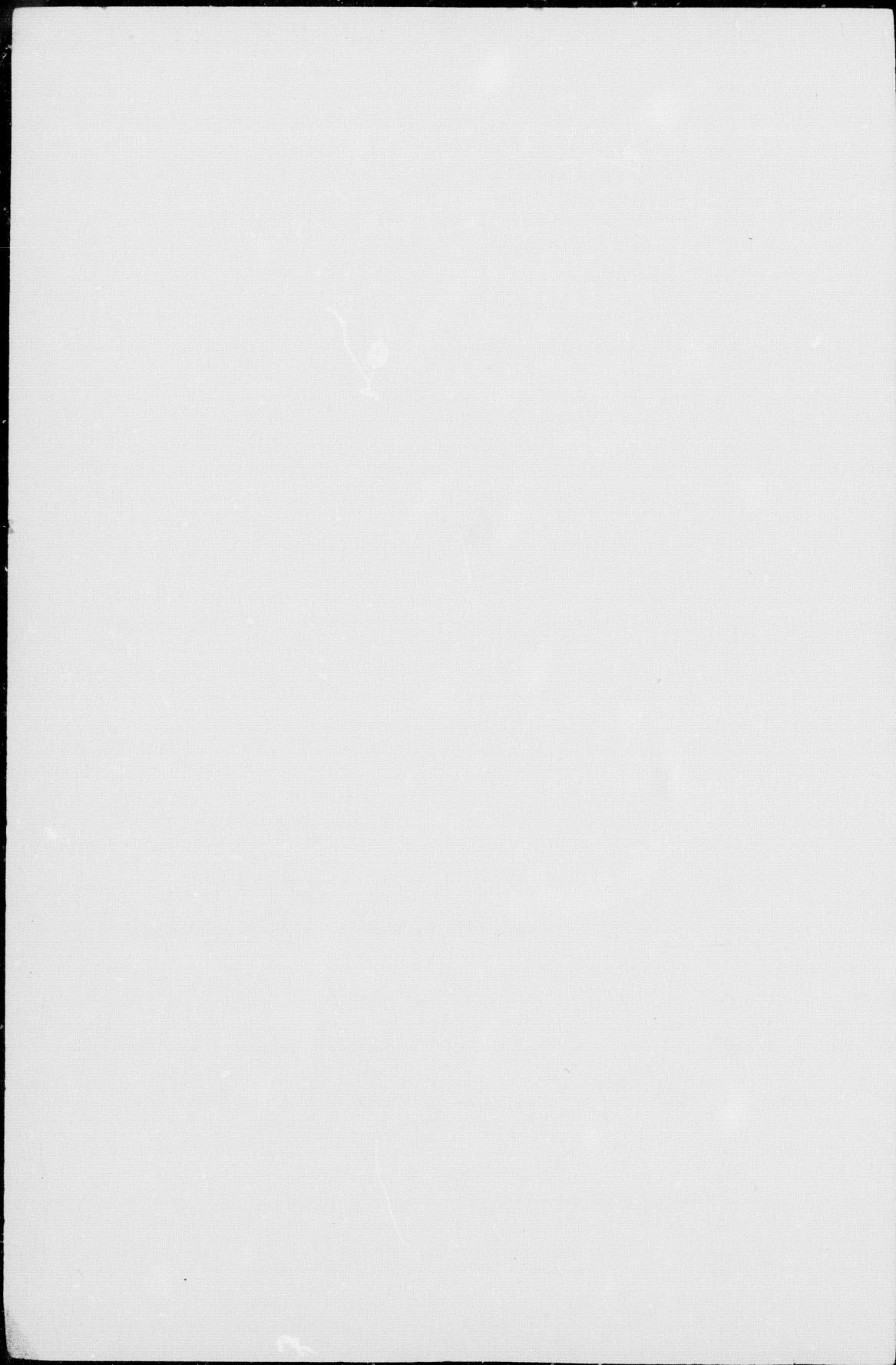


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-4127

ACHWAN HORNG,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a, Achwan Horng ("Horng"), petitions this Court to review a final order of deportation of the Board of Immigration Appeals (the "Board") entered on April 28, 1977 (AR 2-5).¹ That order dismissed Horng's appeal from the order and decision of Immigration Judge Alexander Schonfeld on January 20, 1972² (AR 87) and upheld

¹ References preceded by the letter "AR" refer to the certified administrative record previously filed with this Court.

² Horng sought, in his appeal to the Board from Judge Schonfeld's decision on January 20, 1977, to obtain a stay of his deportation on the grounds that his medical condition was so debilitating that he would not be able to travel to Taiwan, the country to which he was granted the privilege of voluntary departure (AR 97). The Board pointed out in its decision that

[Footnote continued on following page]

Judge Schonfeld's March 3, 1976 decision which found Horng deportable under Section 241(a) (2) of the Act, 8 U.S.C. § 1251(a) (2), for illegally remaining in the United States after expiration of his permitted stay (AR 163).

Issues Presented

1. Whether the protections accorded Horng in his deportation proceeding satisfied statutory and constitutional due process requirements and resulted in a fair hearing?

2. Whether the Board of Immigration Appeals' decision that Horng is deportable under Section 241(a) (2) of the Act, 8 U.S.C. § 1251(a) (2), is based upon reasonable substantial and probative evidence in the record? Section 242(b) (4) of the Act, 8 U.S.C. § 1252(b) (4).

Statement of Facts

Petitioner Horng is a 26 year old native and citizen of China (AR 3). On August 27, 1975, Horng entered the United States at New York City as a non-immigrant crewman, authorized to remain a maximum of twenty-nine days (AR 164).³ At the expiration of his authorized stay, Horng failed to depart or to obtain any extension of his authorized stay in this country (AR 3).⁴ Horng

the District Director of the Service alone has the authority to grant such a stay (AR 4), and that the District Director's decision is not reviewable by the Board. See 8 C.F.R. § 243.4. Consequently this Court does not have jurisdiction in this case to decide whether the Board's failure to grant petitioner an indefinite stay of his deportation was an abuse of discretion.

³ Section 252(a) of the Act, 8 U.S.C. § 1282(a).

⁴ By failing to leave the United States, Horng could be subject to criminal prosecution under Section 252(c) of the Act, 8 U.S.C. § 1282(c).

remained in New York City where, on February 24, 1976, he was arrested by the Service at his place of unlawful employment (AR 153).⁵

Following his apprehension, the Service instituted deportation proceedings against Horng on February 25, 1976, by issuing an order to show cause and notice of hearing which was personally served on Horng that day. (AR 164-65). The order to show cause charged Horng with remaining in the United States without authority in violation of Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), and ordered him to appear the following day for a hearing to determine his deportability under this section (AR 164). The order also advised Horng of his rights at the deportation hearing, including the right to be represented by counsel at his own expense, the right to present evidence or witnesses in his behalf, and the right to examine the evidence against him and to cross-examine any witnesses presented by the Service.⁶

After the order to show cause was read and *explained* to Horng in his language (Chinese) to insure that he understood both the charge against him and the nature and purpose of the rights available to him at his deportation hearing (AR 165), he was released from custody, when the \$2500 bond required by the Service⁷ was posted

⁵ As a non-immigrant alien crewman, Section 101(a)(5)(D) of the Act, 8 U.S.C. § 1101(a)(15)(D), Horng was not authorized to obtain employment without the express approval of the Service. 8 C.F.R. § 214.1(c). By violating this restriction in the terms of his entry, Chour was subject to deportation on this as well. Section 241(a)(9) of the Act, 8 U.S.C. § 1251(a)(9).

⁶ Horng was advised of these rights by the reverse side of the order to show cause issued against him (AR 165). The reverse side also indicates that the order to show cause was personally served through the assistance of a Chinese interpreter (*id.*).

⁷ Section 242(a) of the Act, 8 U.S.C. § 1252(a) and 8 C.F.R. § 242.2 permits the Service to establish such conditions for an alien's release from custody, including the posting of a bond, as it deems appropriate.

by David Yuan (AR 18), who guaranteed to produce Horng for a deportation hearing which was rescheduled for March 3, 1976.⁸

On March 3, 1976, Horng's deportation hearing was held before Immigration Judge Alexander Schonfeld.⁹ (AR 160). A Chinese interpreter employed by the Service was present at the hearing and interpreted the proceedings.¹⁰ At the outset Judge Schonfeld asked Horng if he wished to have an attorney represent him and he declined (AR 162). After Horng conceded his deportability by admitting to the factual allegations set

⁸ In his brief Horng contends that the order to show cause served on him by the Service was defective because it only provided him with "25 hours notice of the deportation hearing." Petitioner's brief at p. 14. This contention is frivolous. When Horng was released on bond from the Service's Brooklyn Detention facility on February 25, 1976 the guarantor of the bond, David Yuan, assumed the responsibility of producing Horng for his deportation hearing. Mr. Yuan at that time was notified that Mr. Horng's hearing would be on March 3, 1977, seven days later as is required by 8 C.F.R. § 242.1. Moreover, Horng specifically requested an immediate hearing, thereby waiving the right to an extended notice (AR 165).

⁹ Horng's deportation hearing on March 3, 1976 was recorded on tape. Since Horng admitted the charge against him and waived his appeal to the Board, the tape was placed in storage by the Service and *not* transcribed until the certified administrative record was prepared for filing with this court. See note 17 *infra*.

¹⁰ Pursuant to 8 C.F.R. § 12, any person who acts as an interpreter in a deportation hearing shall be sworn "to interpret and translate accurately, unless the interpreter is an employee of the Service in which event no such oath shall be required." *Mealha v. Shaughnessy*, 219 F.2d 600, 601 (2d Cir. 1955). See *Cuoto v. Shaughnessy*, 218 F.2d 758, 759 (2d Cir. 1955), *cert. denied*, 349 U.S. 952 (1955).

forth in the order to show cause,¹¹ the immigration judge discussed with the Service's attorney and Horng the possibility of granting Horng voluntary departure,¹² the only form of relief from deportation available to him at that time (AR 161). Since the Service did not object and because Horng represented a willingness and ability to depart, the judge entered an order granting him thirty days in which to depart voluntarily and issued an alternative order of deportation to the Republic of China on Taiwan in the event Horng failed to depart within the time allotted (AR 161).

Prior to serving Horng with the decision, Judge Schonfeld asked him if he "accepted" this decision (AR 161). Horng inquired whether he could have a lawyer within this thirty day period (*id.*). Again Judge Schonfeld explained to Horng that his right to counsel extended to the whole deportation proceeding and that if he wished

¹¹ The transcription of the tape recording of Horng's deportation hearing begins, due to mechanical difficulties, at the point concerning whether he should be granted the discretionary relief of voluntary departure under Section 244(e) of the Act, 8 U.S.C. § 1254(e). However the fact that Horng admitted to overstaying his deportation is clearly established by the decision and order entered by Judge Schonfeld which states that his finding of deportability was based on the alien's admissions (AR 163). An immigration judge only has the authority to enter such a summary discussion under 8 C.F.R. § 242.18(b) when deportability is determined on the pleadings pursuant to 8 C.F.R. § 242.16(b).

¹² See Section 244(e) of the Act, 8 U.S.C. § 1254(e), and 8 C.F.R. § 244. This relief can be granted where the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted it removes the stigma of an order of deportation from the alien's record and facilitates any future lawful entry into this country he might wish to make. See Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17); *Ballenilla-Gonzales v. I.N.S.*, 546 F.2d 515, 521 (2d Cir. 1976).

to have the assistance of counsel the proceeding would be cancelled and rescheduled for another date (AR 161-62). In response Chour decided to accept Judge Schonfeld's decision, thereby waiving his right to appeal (*id.*). Horng's decision was then noted by the Judge on the summary decision form. A copy of that decision was served and read to him by the interpreter and the hearing was closed (AR 163).

Despite having waived his appeal, Horng, nine days later, retained counsel, and filed an appeal from Judge Schonfeld's order. (AR 3). The notice of appeal, however, was defective because it was filed on appeal form (I-290B) (AR 110) thereby directing it to the Service's Regional Commissioner, not on form (I-290A) which the regulation requires be used for appeals to the Board. 8 C.F.R. § 242.21.¹³ The Regional office, lacking jurisdiction to hear the appeal, informed Horng's counsel that his appeal was denied (AR 3). Thereafter Horng's counsel submitted a belated notice of appeal to the Service on the proper form which was undated and failed, despite the requirement under 8 C.F.R. § 242.21, to state the grounds for the appeal (AR 90).

On April 3, 1976 Horng requested a stay of his deportation from the Services New York office pending his appeal to the Board of Immigration Appeals (AR 114). The request was denied administratively on April 7, 1976 when the Service notified Horng that since his notice of appeal to the Board was untimely it was being treated as a "motion to reopen" and was being forwarded to an immigration judge for appropriate action. (AR 156 and

¹³ The regulation requires that the reasons for the appeal be stated briefly on form I-290A, and advises warning that a failure to do so may constitute a ground for dismissal of the appeal by the Board. 8 C.F.R. § 242.21.

157).¹⁴ A warrant of deportation was issued on April 5, 1976 as a result of his failure to comply with the voluntary departure order as he agreed to at his deportation hearing. Horng was permitted, however, until May 6, 1976 to surrender for deportation (AR 7).

On April 28, 1976, one week prior to his scheduled deportation, Horng's counsel telephoned the Board of Immigration Appeals and requested a stay of his deportation (AR 155). The Board denied his request in a written decision issued on May 3, 1976 stating that from the information submitted, the immigration judge, not itself, had the jurisdiction to grant such a stay.¹⁵ (AR 152). Consequently Horng returned to the immigration judge seeking a stay. Apparently, however, he was told by the judge that he did not have jurisdiction of the case because the belated appeal filed with the Board gave it exclusive authority to grant a stay. (AR 120). When the Board was informed of this by petitioner's counsel, it advised him on May 5, 1976 that his client need not report for deportation in light of the outstanding appeal from the order of deportation (AR 120).¹⁶ For the next eight months Horng's case lied dormant.

¹⁴ Horng's counsel submitted to the Service papers dated April 29, 1976 in support of his "motion to reopen." (AR 127-50).

¹⁵ This conclusion by the Board is understandable in light of 8 C.F.R. § 243.4. That section provides that the denial of a request for a stay of deportation by a District Director does not preclude a special inquiry officer (immigration judge) from granting a stay pending his determination of a *motion to reopen* a case within his jurisdiction. Since the Service had characterized Horng's belated appeal to the Board as a motion to reopen (AR 156 and 157) and sent it to an immigration judge for consideration (*id.*), the Board's decision was proper.

¹⁶ Horng's counsel, in light of this decision, submitted a brief to the Board on May 7, 1976 in support of the appeal.

On January 20, 1977, Immigration Judge Schonfeld finally received Horng's application for a stay of deportation dated April 28, 1976 (AR 125) and notice of appeal to the Board (AR 90). As the Service had done before, he treated the belated appeal and request for a stay as a motion to reopen and decided to deny it (AR 4). In his written order, Judge Schonfeld found that the "motion to reopen" contained "no compelling reason" to reopen the case because Horng had a deportation hearing offering him all his rights and granting him the only administrative discretionary relief available (AR 81).

Horng was notified by the Service on March 1, 1977 that he was to report for deportation to Taiwan on March 15, 1977 (AR 42). On March 11, 1977 Horng appealed Judge Schonfeld's order to the Board. (AR 12). On March 14, 1977, Horng applied to the Service's District Director for a stay of his deportation claiming that a "serious illness" he was being treated for prevented him from traveling (AR 20-31). Attached to the application was a copy of the petitioner's hospital records chronicling his condition (*id.*). The District Director on March 16, 1977, based on this record, agreed to stay Horng's deportation pending a medical examination to determine his fitness to travel (AR 11). Accordingly, Horng was directed to go to the Lower Manhattan Gramercy Medical Center with a copy of his medical history on March 31, 1977 for an examination by an independent physician (*id.*).

On April 1, 1977 the Service received the report of the examining physician, a Dr. Paul Auspitz (AR 8). In his report, after examining Horng and reviewing his

medical history, the doctor concluded that Horng was not only able to travel without any danger, but was even fit to work as a laborer (*id.*). The only care Dr. Auspitz prescribed for Horng was continued medication on an out-patient basis for the following six month period (AR 8). The opinion of this physician was forwarded to the Board of Immigration Appeals on April 15, 1977 (AR 6).

On April 28, 1977 the Board issued an opinion in which it certified the entire record of the case to itself under 8 C.F.R. § 3.1(c), thereby settling any and all questions of jurisdiction. The Board dismissed the appeal. In its opinion the Board concluded that the record, despite the lack of a transcript of the deportation proceeding,¹⁷ did not contain any evidence of prejudicial harm or denial of due process to the petitioner and that Judge Schonfeld's finding of deportability was established by clear, convincing and unequivocal evidence in the record. Moreover, the Board noted that the District Director alone is empowered to stay an alien's deportation because of a medical condition and in light of the physician's examination on March 31, 1977 there was no basis to grant such a stay (AR 4). Accordingly, the Board denied the appeal and reauthorized the granting of voluntary departure

¹⁷ The record of proceedings before the Board at that time did not include a transcript of Horng's deportation proceeding because as noted before he had waived his appeal at his hearing and the Board was therefore only reviewing Judge Schonfeld's decision on January 20, 1977 denying Horng's "motion to reopen".

Since the Board decided that Judge Schonfeld had erred in considering Horng's notice of appeal application for a stay as a "motion to reopen", it certified jurisdiction to itself. Upon reviewing the record, without transcript, to evaluate Horng's contention, it necessarily decided that a transcript in this case would not be necessary considering the simple issue of fact, the clear evidence in the record to support deportability, and the fact that Horng received the only remedy available to him, voluntary departure.

within whatever terms and conditions the District Director might deem appropriate (*id.*).

Pursuant to this opinion the Service notified Horng on May 16, 1977 that he would be permitted to leave the United States voluntarily on or before June 27, 1977 (AR 1). On June 27, Horng failed to deport, filing instead a petition for review to this Court and thereby acquiring the automatic stay of deportation which accompanies every petition for review filed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

ARGUMENT

POINT I

The Protections Accorded Horng In his Deportation Proceeding Satisfied Statutory And Constitutional Due Process Requirements And Resulted In A Fair Hearing.

Cognizant of the severe problem posed by the illegal entry of aliens into this country, the courts have continually and steadfastly affirmed Congress' plenary power to establish procedures for the admission and expulsion of aliens. *Fiallo v. Bell*, 97 S. Ct. 1473 (1977); *Kliendienst v. Mandel*, 408 U.S. 753, 766 (1972); *The Japanese Immigrant Case*, 189 U.S. 86 (1902). It has also been recognized that such proceedings are civil administrative proceedings, and requests by permanent resident aliens to extend to deportation hearings the accused's Sixth Amendment guarantees in a criminal trial, including the right to counsel have been rejected. *Woodby v. I.N.S.*, 385 U.S. 276, 285 (1966); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *Bugajewitz v. Adams*, 228 U.S. 585 (1913). Instead, the courts have only required that the deportation proceedings established by Congress comply with the require-

ment of fundamental fairness inherent in the due process clause of the Fifth Amendment, *Wong Sung v. McGrath*, 339 U.S. 33 (1950), and have limited their review of these proceedings to an inquiry into whether the deportation hearing at issue was fair. *Ballenilla-Gonzalez v. I.N.S.*, *supra* 546 F.2d at 520; *Casteneda-Delgado v. I.N.S.*, 525 F.2d 1295 (7th Cir. 1975); *Aalund v. Marshall*, 461 F.2d 710, 711 (5th Cir. 1972); *Kam Ng v. Pilliod*, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961).

The due process requirements of a fair administrative hearing vary with the loss to be suffered by the individual and the governmental interest in the proceeding. As a result the Supreme Court has not required administrative hearings to conform to the rigid due process requirements of a criminal trial but has allowed flexibility in the hearing so long as fundamental fairness results. *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973); *Goldberg v. Kelley*, 397 U.S. 254, 264-65 (1970); see Friendly, "Some Kind of Hearing", U. Pa. L. Rev. 1267 (1975).

Pursuant to Congress' plenary power the Service has enacted procedures which accord fundamental fairness to every alien in a manner consistent with the strong national interest in the expeditious deportation of aliens unlawfully in this country. The results, incorporated into the Act at Section 242(b) (1-4), 8 U.S.C. § 1252(b) (1-4), and the regulations at 8 C.F.R. § 242, grant each alien in a deportation proceeding a number of due process rights which insure a fair hearing. While adherence to these procedures is clearly preferable, the fact that some irregularity or error may have been committed does not, by itself, make the hearing unfair or justify judicial intervention to invalidate the proceeding. *Corniel-Rodriguez v. I.N.S.*, 532 F.2d 301, 307 n.18 (2d Cir. 1976);

Cheung v. I.N.S., 418 F.2d 460, 464 (D.C. Cir. 1969); *Pineiro-Lopez v. Kennedy*, 293 F.2d 540, 542-43 (D.C. Cir.), cert. denied, 368 U.S. 866 (1961); *United States ex rel. Sollazzo v. Esperdy*, 187 F. Supp. 753, 755 (S.D. N.Y.), aff'd, 385 F.2d 341, (2d Cir.), cert. denied, 386 U.S. 905 (1960); *United States ex rel. Dentico v. Esperdy*, 280 F.2d 71, 73 (2d Cir. 1960); *DeSouza v. Barber*, 263 F.2d 470, 475-76 (9th Cir. 1959); *Mealha v. Shaughnessy*, 219 F.2d 600, 602 (2d Cir. 1955); *Cuoto v. Shaughnessy*, 218 F.2d 758, 760 (2d Cir. 1955). Moreover, the application of the doctrine of harmless error to deportation proceedings merely reflects the well settled law that procedural irregularities in administrative proceedings must be prejudicial to a party to warrant judicial intervention. *Haltmier v. Commodity Futures Trading Comm.*, Dkt. No. 76-4169, slip op. 3415, 3423 (2d Cir. May 9, 1977); *Buck v. Board of Education of the City of New York*, 553 F.2d 315 (2d Cir. 1977); *Equal Employment Opportunity Commission v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1360-61 (6th Cir. 1975); *Arthur Murray Studio Inc. v. Federal Trade Commission*, 458 F.2d 622, 624 (5th Cir. 1972); *National Labor Relations Board v. Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 224 (8th Cir. 1970); *R.A. Holman & Co. v. S.E.C.*, 336 F.2d 736, 740 (2d Cir. 1965); *Alsbury v. United States Postal Service*, 392 F. Supp. 71, 75-6 (C.D. Calif. 1975); *John V. Carr & Son v. United States*, 347 F. Supp. 1390, 1397 (Cust. Ct. 1972); *Otero v. New York City Housing Authority*, 344 F. Supp. 737, 745 n. 13 (S.D.N.Y. 1972). Indeed, it is well established that the harmless error doctrine is applicable to criminal proceedings as well. *E.g.*, *United States v. Daniels*, *supra*.

It is this context that Horng's due process contentions must be examined to ascertain if his 1974 deportation hearing was fundamentally fair.

A. Horng received a fair hearing in the absence of counsel, effectively waived his statutory right to retain counsel and was not prejudiced by his waiver of retained counsel.

An important element in a fair hearing is the opportunity to be represented by counsel. The Courts have sustained Congress' implementation of this element of due process through the requirement that an alien be informed of his statutory right to be represented by a lawyer, and be given the opportunity to obtain one. *Henriques v. I.N.S.*, *supra*; *United States ex rel. Woldinger v. Reimer*, 103 F.2d 435, 436 (2d Cir. 1939).¹⁸ Moreover, since deportation proceedings are civil in nature and do not result in confinement, an alien is not entitled to the Sixth Amendment's guarantee of counsel, *Burquez v. I.N.S.*, 513 F.2d 751 (10th Cir. 1975); *Martin-Mendoza v. I.N.S.*, 499 F.2d 918 (9th Cir.), *cert. denied*, 419 U.S. 1021 (1974), or to the due process clause's guarantee of counsel. See *In re Gault*, 387 U.S. 1 (1967); *Gagnon v. Scarpelli*, *supra*. Thus, there is no requirement, either under due process concepts or the Act, that counsel be present in every case. *Ballenilla-Gonzalez v. I.N.S.*, *supra*; *Henriques v. I.N.S.*, *supra*; *Carbonell v. I.N.S.*, 460 F.2d 140 (2d Cir. 1972).

The absence of counsel at a hearing will not, by itself, invalidate the hearing where the alien has been properly informed of his right to be represented, has been given a fair opportunity to exercise this right, and has elected to proceed without counsel with no resultant prejudice.

¹⁸ See Section 242(b)(2) of the Act, 8 U.S.C. § 1252(b)(2). This requirement has been enforced strictly in the Third Circuit, *Cholmos v. I.N.S.*, 516 F.2d 310 (3d Cir. 1975), and in the Seventh Circuit, *Castaneda-Delgado v. I.N.S.*, *supra*, while this Circuit has adopted the doctrine of prejudicial error. *Henriques v. I.N.S.*, *supra*.

Before appointed counsel is required by due process in a specific case, the factual circumstances of that case must reflect the need for appointed counsel to insure a fair hearing, i.e., that a counsel's presence and participation would be meaningful and significant. *Gagnon v. Scarpelli*, *supra*, 411 U.S. at 790; *United States v. Daniels*, *supra*; *Aguilera-Enriques v. I.N.S.*, 516 F.2d 565, 568-69 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *Burquez v. I.N.S.*, *supra*, 513 F.2d at 755; *Henriques v. I.N.S.*, *supra*, 465 F.2d at 120-21.

The presence of counsel at Horng's deportation hearing would not have affected the outcome. The sole issue before Immigration Judge Schonfeld was whether Horng had overstayed his twenty-nine day visa. *Henriques v. I.N.S.*, *supra*, 465 F.2d at 120. Throughout Horng's administrative proceedings his attorney failed to refer to any evidence which might indicate that Horng had authority to remain in the United States after his visa expired. Consequently it is undisputed that he overstayed his visa and is deportable as charged in the original order to show cause. Moreover, in this case the presence of mitigating circumstances, no matter how compelling, would have been completely irrelevant to this determination. *Ballenilla Gonzalez v. I.N.S.*, *supra*, 546 F.2d at 520; *Henriques v. I.N.S.*, *supra*. Horng obtained the only form of discretionary relief available, voluntary departure; counsel, even if present, could not have obtained any other result at the hearing. *Ballenilla-Gonzales v. I.N.S.*, *supra*; *Henriques v. I.N.S.*, *supra*.

In addition, Horng was clearly informed of his right to retain counsel at no expense to the Government and was given the opportunity to engage such counsel, but effectively waived this right. Section 242(b)(2) of the Act, 8 U.S.C. § 1252(b)(2), requires the Service to notify aliens subject to deportation proceedings that they have

"the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceeding, as he shall choose. . . ."

In this case Horng was afforded this statutory right when the order to show cause was served on him. The reverse side of this order advised Horng:

"If you choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service."

This right was read and explained to Horng in his language when it was served. As a result it is clear that Horng was fully advised of his statutory right to counsel and that his contentions to the contrary are without merit.

In addition to the statutory right to retain counsel, an alien subject to deportation proceedings also has a right, set forth in the regulations at 8 C.F.R. § 242.16(a), to be advised again in his deportation hearing that he has the right to representation, at no expense to the Government, by counsel of his choice. However, this right, as well as the alien's statutory right to counsel, can be waived when an alien, fully aware of his right to counsel, chooses to proceed without counsel. *Ballenilla-Gonzalez v. I.N.S.*, *supra*; *Burquez v. I.N.S.*, *supra*; *United States ex rel. Dentico v. Esperdy*, *supra*. The waiver must be made intelligently and voluntarily, with a full understanding of the right waived. *Ballenilla-Gonzalez v. I.N.S.*, *supra*; *Burquez v. I.N.S.*, *supra*.

The record before this Court demonstrates that Horng effectively waived his right to counsel. He was advised on three separate occasions that he had the right to retain an attorney. Although the first time that Horng was

advised by Judge Schonfeld of his right to counsel does not appear on the transcript of that hearing, the second and third occasions do and both clearly complied with 8 C.F.R. § 242.16. Surely his response to the third warning, "I accept your decision" is a clear indication (AR 33) that he was aware of his right to retain counsel, that he understood the Immigration Judge's warning, and that he had made a deliberate and conscious decision to proceed with his hearing and accept the Judge's decision without representation. In this context, Horng's waiver of counsel was an intelligent and voluntary one which precludes any claim to the contrary.

Finally, even if Horng's waiver of counsel had not been voluntary, this would not have been such a flaw in the hearing that it would have to be remanded. The sole issue at the hearing, so far as deportability was concerned, was whether Horng had overstayed his authorized stay. It raised no complex issue of law or fact which would have made an attorney's presence useful. No witnesses were called, or could have been called, for there was no evidence which could have altered the result. In fact Judge Schonfeld, pursuant to his powers under 8 C.F.R. 242.16(b) and 8 C.F.R. § 242.18(g), entered a summary decision finding, Horng deportable on this basis of his admission to overstaying his non-immigrant visa. Therefore, the absence of counsel did not prejudice Horng's case as all of the relevant facts concerning deportation were presented to the Immigration Judge. In similar circumstances the courts have consistently held that such a hearing without counsel does not offend due process. *Casteneda-Delgado v. I.N.S.*, *supra*; *Aguilera-Enriquez v. I.N.S.*, *supra*; *Dunn Martin v. District Director*, 426 F.2d 894 (9th Cir. 1970); *Barthold v. I.N.S.*, *supra*; *Strantzalis v. I.N.S.*, 465 F.2d 1016 (3d Cir. 1972); *Tupacyupanqui-Marin v. I.N.S.*, *supra*; *United States v. Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975).

Villanueva-Juado v. I.N.S., 482 F.2d 886 (5th Cir. 1973); *Rosales-Cabellero v. I.N.S.*, 472 F.2d 1158 (5th Cir. 1973); *Martin-Mendoza v. I.N.S.*, *supra*.

B. Even if Horng was not notified of his right to appeal to the Board, the failure of the Immigration Judge to notify him was not prejudicial.

An alien found deportable under Section 241 of the Act, 8 U.S.C. § 1251, is entitled to appeal that decision to the Board of Immigration Appeals. Accordingly, the Attorney General has provided that such aliens are to be notified of this right. 8 C.F.R. § 3.3. In fact, the immigration judge, in a case such as this, is *required* under 8 C.F.R. § 242.19 to both furnish the alien with the proper form for appealing the decision to the Board (I-290 A) and to advise him of the applicable provisions relating to such an appeal, unless the alien waives his right to appeal.

The decision of Judge Schonfeld on March 3, 1976 clearly indicates that Horng waived his right to appeal (AR 163). Horng now contends that he was deprived his due process rights under the regulation because he was never so notified. While it must be conceded that the transcript of Horng's deportation hearing does not reflect a specific instruction by Judge Schonfeld pursuant to the regulation, an examination of this irregularity reveals the harmless nature of such an error.

After accepting Horng's admission to overstaying his visa and determining to grant him voluntary departure, Judge Schonfeld entered his decision and order and asked Horng if he "accepted" the decision (AR 161). In response, Horng asked if he could hire a lawyer (presumably to contest the decision). (*Id.*) Judge Schonfeld informed him that he could and if he chose to do so

the hearing would be cancelled and rescheduled. Horng decided to "accept" the Judge's decision (AR 162) and the appeal to the Board was therefore considered waived by Judge Schonfeld.

Despite this waiver the Board assumed jurisdiction of the case thereafter and upon reviewing the record concluded that Horng had not been denied his due process rights and that his deportability had been established by clear, convincing and unequivocal evidence (AR 4). Therefore even if Judge Schonfeld's dialogue with Horng does not constitute a sufficient notice of his right to appeal, Horng was not prejudiced by the judge's actions because he ultimately received an appellate review of his hearing by the Board.

POINT II

The Board's Finding that Horng Was Deportable Under Section 241(a)(2) Of The Act, 8 U.S.C. § 1151 (a)(2) Is Supported By Reasonable, Substantial And Probative Evidence In The Record.

The Board found that Horng's deportability was established, pursuant to the Government's burden under *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 286 (1966), by "clear, convincing and unequivocal evidence" in the record (AR 4). Applying the narrow standard of review enunciated by the Supreme Court in *Woodby*, this Court must decide whether there is reasonable, substantial and probative evidence in the record, when considered as a whole, to support the Board's finding regarding Horng's deportability. *Kokinis v. District Directors of the Immigration and Naturalization Service of New York, New York and Buffalo, New York*, 429 F.2d 938, 942 (2d Cir. 1970). The following facts clearly demonstrate that there is reasonable,

substantial and probative evidence in the record, even without a transcript, to support the Board's determination.

The sole issue regarding Horng's deportability before Judge Schonfeld and the Board on appeal was whether Horng had overstayed his twenty-nine day visa. Since Horng admitted to overstaying his visa, Judge Schonfeld concluded there were no material issues of fact and under the authority vested in him by the Attorney General entered a summary decision based on the pleadings. 8 C.F.R. § 242.18(b). Consequently the Board faced with such an order on appeal did not need a transcript of the proceedings to conclude that Horng had overstayed his visa. The record forwarded on appeal to the Board clearly indicated that Horng was apprehended months after his twenty-nine day period had lapsed. There was nothing in the record indicating that Horng had authority to remain in the United States after expiration of his visa and Horng's attorney throughout all of the administrative actions initiated on his client's behalf had failed to refer to any evidence which might have indicated Horng's authority to remain beyond his authorized stay.

In short, the Board, like Judge Schonfeld, was presented with a very simple issue of fact, established to a certainty by the alien's conduct and documented unqualifiedly by the record. For Horng to argue that his deportability was not established by clear convincing and unequivocal evidence is, at best, preposterous.

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
November 3, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that s he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
she served ~~an~~ copy of the
within Brief for Respondent

by placing the same in a properly postpaid franked envelope addressed:

David C. Buxbaum, P. C.
11 Broadway
Suite 1612
New York, New York 10004

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

7th day of November, 1977

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1979

